No. 14718

In the
United States Court of Appeals
For the Ninth Circuit

PAUL M. BROPHY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Opening Brief of Appellant

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TOPICAL INDEX

TABLE OF CASES AND AUTHORITIES CITED

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STATEMENT RELATIVE TO JURISDICTION

This is an action by the United States (plaintiff below and appellee here) to enjoin the defendant (appellant) from (a) using a well on land owned by him and pumping water therefrom for irrigation of such land; (b) drilling new wells; and (c) pumping for irrigation of other lands owned by him within the boundaries of the San Carlos Federal Irrigation Project in Arizona.

The amended complaint of the plaintiff, with attached exhibits, appears at pages 3 to 92, inclusive, of the transcript of record herein, the prayer for relief being set forth upon page 19.

The appeal is from the judgment (denominated "Findings of Fact, Conclusions of Law and Decree") granting such injunction (Tr. 109-117) and the order of the court denying defendant's motion for new trial (Tr. 118). The notice of appeal appears at pages 132 and 133 of the transcript.

Plaintiff invoked the jurisdiction of the District Court under Section 1345 of Title 28 of the United States Code.

It is believed the Court of Appeals has jurisdiction under Section 1291 of Title 28, U.S.C.

STATEMENT OF THE CASE

With the permission of the court, the parties will hereafter be referred to as they appeared in the court below, i.e., appellee as plaintiff and appellant as defendant.

As will be observed from the transcript of the record, the pleadings, findings and conclusions are somewhat voluminous, but there is little or no factual dispute apparent.

As appears to defendant, the questions to be determined upon the appeal are:

1. Does the "Landowners' Agreement" ("Exhibit A", Tr. 20-50) prohibit the installation and operation of the appellant's well and pump; or does it merely provide they may be prohibited or their use restricted by regulation or order of the Secretary of the Interior?

2. Has there been any valid regulation or order of the Secretary restricting or prohibiting the use of such well and pump?

The above questions were raised in the trial court by:

(a) The amended complaint of the plaintiff (Tr. 3-92);

(b) Defendant's answer to amended complaint (Tr. 97-100);

(c) Statement of counsel at the commencement of the trial (Tr. 120-128);

(d) Objections to the reception of evidence at the trial (Tr. 128-132);

(e) Defendant's objections to proposed findings and conclusion submitted by plaintiff (Tr. 106-108); and

(f) Defendant's motion for new trial (Tr. 117-118).

SPECIFICATION OF ERROR

The District Court erred in rendering judgment in favor of the plaintiff and in denying defendant's motion for new trial because:

(a) The amended complaint fails to state a claim upon which relief can be granted; and

(b) The "Landowners' Agreement" ("Exhibit A" annexed to plaintiff's amended complaint, Tr. 20-50) contains no prohibition against the installation and operation of the defendant's well and pump, unless and until there shall have been promulgated a valid regulation or order by the Secretary of the Interior prohibiting or restricting the use of such well and pump; and there has been no such regulation or order.

SUMMARY OF ARGUMENT

1. The "Landowners' Agreement" ("Exhibit A" attached to the plaintiff's amended complaint) does not prohibit the installation or operation of the defendant's well and pump.

2. Such Landowners' Agreement does provide that such installation and operation may be prohibited or their use restricted by valid regulation or order of the Secretary of the Interior; but there has been no such valid regulation or order.

3. The remedy of the plaintiff, if there has been a violation of the decree entered by the United States District Court for the District of Arizona in cause numbered E-59-Globe, is by motion to enforce such decree and not by an independent suit for injunction.

ARGUMENT

I.

THE "LANDOWNERS' AGREEMENT" ("EXHIBIT A" ATTACHED TO THE PLAINTIFF'S AMENDED COMPLAINT) DOES NOT PROHIBIT THE INSTALLATION OR OPERATION OF THE DEFENDANT'S WELL AND PUMP.

The pertinent provision of the "Landowners' Agreement," upon which plaintiff relies for its injunction, is found upon pages 32 and 33 of the transcript of record, thus:

> "All underground and also all diffused surface water under, in or upon the white lands embraced in the said San Carlos project, except such as may from time to time be needed and utilized by the owners of such lands for their domestic water supply, shall at all times be available to said project for development and use as an irrigation water supply for said project; and the undersigned promises and agrees, in respect to his land which shall be taken into said project, to give to the United States or said project the necessary rights of way for the use of such waters and agrees further not to drill or operate wells in any other way for use or permit others to use said waters for irrigation contrary to any rules, orders, or regulations promulgated by the Secretary of the Interior with relation to said waters on said project."

Plaintiff contends such provision should be read as though separated into parts and numbered as follows:

"(1) All underground and also all diffused surface water under, in or upon the white lands embraced in the said San Carlos Project, except such as may from time to time be needed and utilized by the owners of such lands for their domestic water supply, shall at all times be available to said project for development and use as an irrigation water supply for said project;

"(2) and the undersigned promises and agrees, in respect to his land which shall be taken into said project, to give to the United States or said project the necessary rights of way for the use of such waters;

"(3) and agrees further not to drill or operate wells in any other way;

"(4) or use or permit others to use said waters for irrigation contrary to any rules, orders, or regulations promulgated by the Secretary of the Interior with relation to said waters on said project."

Defendant insists such numbering and division is improper, as it is plain, as the instrument is written, there is no prohibition against the use of the irrigation facilities in question, unless the Secretary of the Interior so directs, but, if punctuation and separation into clauses are required, the sentence should be thus punctuated and divided:

"(1) All underground and also all diffused surface water under, in or upon the white lands embraced in the said San Carlos Project, except such as may from time to time be needed and utilized by the owners of such lands for their domestic

water supply, shall at all times be available to said project for development and use as an irrigation water supply for said project;

"(2) and the undersigned promises and agrees, in respect to his land which shall be taken into said project, to give to the United States or said project the necessary rights of way for the use of such water;

"(3) and further agrees not to drill or operate wells in any other way, or use or permit others to use said waters for irrigation, contrary to any rules, orders, or regulations promulgated by the Secretary of the Interior with relation to said waters on said project."

It is most respectfully submitted that if the learned government counsel who prepared the contract had intended that it bear the construction for which plaintiff now contends, he would have used the appropriate words he employed in the same document with reference to the "Indian Lands" embraced within the project. There he made it very plain that the "Indian Lands," as distinguished from the other lands, should (unless otherwise ordered by the Secretary) "be devoted to the use and benefit of said project and the lands thereof." In drafting that portion of the contract relating to irrigation facilities upon Indian lands, such counsel was careful to say (Tr. 33):

> "Such *underground* and diffused surface waters as may be under, in, or upon *Indian lands* embraced in said project *and the wells, pumps, and facilities in connection therewith,* in so far as shall

> be permitted by law and in so far as the Secretary of the Interior shall deem proper, *shall be devoted to the use and benefit of said project and the lands thereof.*" (Emphasis supplied.)

But, with reference to the non-Indian lands in the project, the language employed does not prohibit the use of wells or pumps upon privately owned property, but does subject the same to the rules, orders and regulations of the Secretary of the Interior. With emphasis supplied by the defendant, the covenant upon the part of the landowner reads:

> "agrees not to drill or operate wells in any other way or use or permit others to use said waters for irrigation *contrary to any rules, orders or regulations promulgated by the Secretary of the Interior with relation to said waters on said project.*"

Stripped down to the bare essentials, then, the landowner

> " . . . agrees not to drill or operate wells . . . for irrigation . . . contrary to any rules, orders or regulations promulgated by the Secretary of the Interior . . . "

To defendant it seems that the following cardinal rules for the construction of the language of contracts are here applicable:

(a) Courts in interpreting written contracts endeavor to give effect to the mutual intention of the parties as it existed when the contract was executed.

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp. (9th Cir.) 178 F. 2d 541, 552;

Fagerberg v. Phoenix Flour Mills Co., 50 Ariz. 227, 71 P. 2d 1022, 1026;

Henderson v. Jacobs, 73 Ariz. 195, 239 P. 2d 1082, 1085.

(b) The court cannot make a new contract for the parties.

Ernst v. Deister, 42 Ariz. 379, 26 P. 2d 648, 649;

Peterson v. Hudson Insurance Co., 41 Ariz. 31, 15 P. 2d 249, 251.

(c) Courts will give the construction most equitable to the parties and one which will not give one of the parties an unfair advantage over the other.

State for the Use of Pierson v. C. G. Willis & Sons, 46 Ariz. 217, 50 P. 2d 20, 23;

17 C. J. S., Sec. 319, pp. 739, et seq.

(d) An ambiguous contract is to be construed most strongly against the party who prepared it.

Northern Pacific R.R. Co. v. Twohy Bros. Co. (9th Cir.), 95 F. 2d 220, 223;

Aldous v. Intermountain Bldg. & Loan Assn., 36 Ariz. 225, 284 P. 353, 355;

Hoover v. Odle, 31 Ariz. 147, 250 P. 993, 994, and cases there cited.

So, we have here presented a contract prepared by the plaintiff and executed by defendant's predecessor

in the ownership of the land upon which the well is located.

We have the choice of a construction as contended by plaintiff which will deprive defendant of his use of the pump and well (concededly owned by him and located upon his own land and used for the irrigation thereof), or the construction which defendant contends appropriate, permitting him the use of the pump and well until a condition shall develop warranting an order of the Secretary of the Interior prohibiting or restricting its further use.

It is most respectfully submitted the construction placed upon the contract by defendant is reasonable and proper and does equity in the premises.

II.

SUCH LANDOWNERS' AGREEMENT DOES PROVIDE THAT SUCH INSTALLATION AND OPERATION MAY BE PROHIBITED OR THEIR USE RESTRICTED BY VALID REGULATION OR ORDER OF THE SECRETARY OF THE INTERIOR; BUT THERE HAS BEEN NO SUCH VALID REGULATION OR ORDER.

No litigation between the parties was necessary. If the use of defendant's pump and well interferred with the rights of the plaintiff, a simple order from the Secretary of the Interior would have afforded plaintiff all the relief to which it could possibly have been entitled.

The Landowners' Agreement, without distortion or punctuation supplied by either party, requires that the defendant do not drill or operate any well contrary to the rules, orders or regulations promulgated by the Secretary of the Interior.

To defendant there appear substantial reasons for such supervision by the Secretary. A well at one location in the project might prove detrimental to the other landowners, whereas at another point it might have no adverse effect and might even be beneficial to the drainage program of the district.

It is submitted that unless plaintiff can point out language in the contract which it prepared, expressly prohibiting the well and pump here in question, the court should not be asked to read into the document something that is not there.

True, plaintiff at the trial endeavored to show there was an order or regulation prohibiting defendant from using his pump and well, but plaintiff fell far short of accomplishing such objective.

The most that can be said for the documentary evidence in the record is that it contains correspondence and memoranda from one employee of the plaintiff to a fellow servant, sometimes with a copy to the defendant, and some letters written by such an employee to the defendant, together with a letter (Exhibit C annexed to the amended complaint, Tr. 81-82) written in 1938 by the then attorney for defendant to the Project Engineer at Coolidge, Arizona. Such "Exhibit C"

"Mr. Perry: It would be there anyway.

"Mr. Murless: If your Honor please, it has been pointed out in connection with the copy of the repayment contract which was rejected generally because, as I understand it, it is a duplication of the file; the copy which I offered also contains the Pinal County decree which treats that contract. It was made a condition precedent, if your Honor please, by the contract and statutes that preceded the San Carlos project.

With that further information concerning that which was offered, and particularly the certified copy of the judgment and decree in 5090 Pinal County, we offer that judgment again, if your Honor please.

"Mr. Perry: I object to it, if your Honor please, it doesn't tend to prove or disprove any issue in this case.

"The Court: Well, I don't see that it does but it may be received." (Tr. 129-130).

If defendant has violated any provision of the equity decree referred to and plaintiff seeks enforcement of such decree, its remedy is by a motion for enforcement to be filed in that action.

In *Taylor v. Tempe Irrigating Canal Co.,* 21 Ariz. 574, 193 P. 12, 13-15, it is said:

"We have come to the conclusion, after much reflection, that plaintiffs cannot be permitted to pursue the remedy of mandamus, because the Kent decree itself has pointed out for them and others

in like situation another, better, speedier, and more adequate remedy, by formal application in the case in which that decree was entered. . . .

"It would be an anomaly in the administration of the law to permit a party claiming a right in an action over which the court retains jurisdiction, as in the *Hurley-Abbott* case, to seek the protection or enforcement of that right in a different and independent action. Why not apply for relief or protection in the pending action? What reason or excuse may be suggested to justify another and different action? If the right asserted has been fully ascertained and determined, the court, upon application, or, for that matter, upon its own motion, possesses the power to protect or enforce it and to that end it may make orders and punish for their disobedience. If the right asserted has not been finally ascertained and determined or is in doubt, the court possesses the power, in disputes and controversies, to do justice and equity between the parties. The remedy is simple and at hand."

CONCLUSION

It is most respectfully submitted that plaintiff, by this action, attempts to have the court do that which the Secretary of the Interior has apparently failed or refused to do, i.e., prohibit the use of defendant's well and pump. If plaintiff is entitled to such an order it should experience little difficulty in obtaining it; but, apparently plaintiff's employees do not believe in the efficacy of such a simple remedy.

It is also most respectfully insisted that neither by pleading nor proof did plaintiff establish its right to an injunction, and that the judgment of the trial court should be reversed.

Respectfully submitted,

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